

- (2) Whether the injury arose out of and in the course of employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

The issue regarding whether marijuana use contributed to an injury, disability or death, thus allowing a denial of liability under K.S.A. 44-501(d)(2) is a certain defense under K.S.A. 44-534a and subject to review by the Appeals Board from a preliminary hearing order.

The Administrative Law Judge, in denying claimant's claim for compensation, found that the marijuana use contributed to the accident. The Appeals Board, for the reasons stated below, disagrees.

Claimant suffered an injury by accident on November 23, 1993, when driving a forklift in the respondent's plant. As he was backing the forklift around a corner into an alleyway, claimant, not seeing another forklift parked in the alleyway, ran into the forklift and suffered injury to both feet and ankles. A test performed by the respondent showed the presence of cannabis in the claimant's system at the time of the injury. The evidence regarding the testing of the claimant as well as the required chain of custody was stipulated to by claimant's attorney at the time of preliminary hearing.

Respondent relies upon the medical evidence of Dr. David A. Peterson in alleging a contribution from the marijuana use. Dr. Peterson's letter of May 23, 1994, states in its entirety, "In regards to your description of Mr. Cooper's fork-lift running into a parked fork-lift, the drug could have been a factor in the accident."

The doctor does not indicate use of the marijuana contributed to the injury, but instead speculates that the use of the drug "could have been a factor."

While it is the claimant's burden to establish the claimant's right to an award of compensation by proving all of the various conditions on which the claimant's right depends by a preponderance of the credible evidence [see K.S.A. 44-501 and K.S.A. 44-508(g)], it is the respondent's burden to establish an affirmative defense such as a contribution by an employee's use or consumption of alcohol, drugs or chemicals.

In this matter, the only evidence alleging a contribution to the injury from the marijuana use is contained in the test reports placed into evidence by the respondent and the May 23, 1994, letter from Dr. David A. Peterson. The test reports indicate claimant had more than 50 NG's of cannabis in his system. No explanation was provided by any medical expert regarding the effect of the cannabis at the level found in the claimant. No information was provided to show that this cannabis level was sufficient to impact claimant's ability to function and no expert testimony was given to show that the existence of this drug in claimant's system "contributed to" the accident. Dr. Peterson opined the drug could have been a factor in the accident. This evidence does not rise to the level required to show a contribution from the marijuana use. Absent more definite evidence that the level of marijuana found in claimant's system was sufficient to "contribute to" this particular accident, the Appeals Board finds the respondent has failed in its burden of proving this certain defense.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge George R. Robertson, dated September 7, 1994, shall be, and hereby is, reversed and this matter shall be remanded back to the Administrative

Law Judge for further findings regarding claimant's entitlement to benefits for the injuries suffered on November 23, 1993.

IT IS SO ORDERED.

Dated this ____ day of January, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Brian D. Pistotnik, Wichita, KS
 John W. Mize, Salina, KS
 George R. Robertson, Administrative Law Judge
 George Gomez, Director